

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACQUELINE F. KENNEDY and DEPARTMENT OF VETERANS
AFFAIRS, PHILADELPHIA DISTRICT OFFICE, Philadelphia, Pa.

*Docket No. 97-1619; Submitted on the Record;
Issued June 9, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective March 2, 1997, based on her capacity to perform the duties of a motor vehicle dispatcher.

The Board has duly reviewed the record in the present appeal and finds that the Office properly reduced appellant's compensation benefits effective March 2, 1997, based on her capacity to perform the duties of a motor vehicle dispatcher.

Once the Office accepts a claim, it has the burden of justifying termination of modification of compensation.¹ If an employee's disability is no longer total, but the employee remains partially disabled, the Office may reduce compensation benefits by determining the employee's wage-earning capacity.² Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.³ After the Office makes a medical determination of partial disability and of special work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist, for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment services or other applicable services. Finally, application of

¹ *Betty F. Wade*, 37 ECAB 556 (1986).

² 5 U.S.C. § 8115(a); *see also* 20 C.F.R. § 10.303(a).

³ *Samuel J. Chavez*, 44 ECAB 431 (1993).

the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁴

In the present case, the Office accepted that appellant sustained employment-related injuries on January 1, 1994 which resulted in bilateral carpal tunnel syndrome. The Office authorized several surgeries for appellant's wrists. Appellant stopped work on March 31, 1994 for various periods and was working in a light-duty position when she stopped work completely on September 3, 1994. The Office authorized the payment of medical benefits and compensation for intermittent periods of temporary total disability commencing March 31, 1994. Effective April 30, 1995, appellant was placed on the periodic rolls.

In a September 27, 1995 medical report, Dr. Randall W. Culp, a Board-certified orthopedic surgeon and appellant's attending physician, released appellant to return to full-time light-duty work following her surgery based on the results of a September 18, 1995 functional capacity evaluation. Dr. Culp temporarily restricted appellant to up to 10 pounds of lifting with no repetitive work for more than 30 minutes at a time. In a May 20, 1996 report, Dr. Culp indicated that these restrictions were permanent.

By letter dated November 14, 1995, the Office referred appellant for rehabilitation services. In a May 22, 1996 report, the vocational counselor indicated that appellant completed vocational testing on April 16, 1996. After reviewing the tests results, the counselor opined that while appellant had "the basic interest and intellectual ability to function in a position similar" to one she had held in the past, she also had "the mental wherewithal to transpose these skills to new occupations where minimal training is provided."

On June 7, 1996 appellant signed an "Individual Placement Plan" that had been prepared by the counselor in which she agreed to participate in "full-time job search activities." In an August 9, 1996 report, the counselor indicated that appellant was not cooperating with the placement efforts. The counselor also stated that appellant felt that her physical therapy may interfere with a full-time position.

During this time period, the Office received a number of office notes, form reports and disability slips in which Dr. Vincent E. Baldino, an osteopath, and Dr. Stuart L. Trager, an orthopedic surgeon, related appellant's complaints of shoulder pain and diagnosed bilateral rotator cuff syndrome.

In a September 10, 1996 report, the vocational counselor again indicated that placement efforts have been unsuccessful due to appellant's reluctance to participate in job placement efforts. The counselor noted that appellant's "vocational history, the results of our vocational testing [and] our job development efforts illustrate that many employment opportunities do exist for her in the open labor market." The counselor submitted CA-66 forms for a sedentary "[m]otor [v]ehicle [d]ispatcher" position and a light-duty "[c]lerk, [g]eneral" position which he found were reasonably available in appellant's commuting area. On each CA-66 form, the counselor noted that he had confirmed the reasonable availability of the position with a state

⁴ *Albert C. Shadrick*, 5 ECAB 376 (1953).

employment service representative and listed the weekly wage as reported on April 1, 1996 by the "Economic Research Institutes Salary Assessor."

In response to the Office's request for a second sedentary position, the vocational rehabilitation counselor submitted a CA-66 form for a sedentary position of "[h]istory-[c]ard [c]lerk ([u]tilities)" that was reasonably available in appellant's commuting area. On the Form CA-66, the counselor noted that he had confirmed the availability of the position with a state employment service representative and listed the weekly wage as derived from "1994 National Census Wage Data." Thereafter, the Office closed appellant's vocational rehabilitation effort.

On October 8, 1996 the Office requested the Office medical adviser to provide an opinion regarding appellant's ability to perform the duties of the two sedentary positions of dispatcher and history-card clerk (utilities) in conjunction with Dr. Culp's restrictions. In an October 9, 1996 response, the medical adviser indicated that appellant could perform the duties of both positions within the work tolerance limits imposed by Dr. Culp.

On October 12, 1996 the Office provided appellant with a notice of proposed reduction of compensation, based on her ability to perform the duties of a motor vehicle dispatcher. The Office advised appellant that if she disagreed with the proposed action, she could submit additional factual or medical evidence relevant to her capacity to earn wages.

The Office continued to receive office notes, form reports and disability slips in which Drs. Baldino and Trager repeated their earlier diagnosis and noted a possible impingement syndrome or rotator cuff tear.

By decision dated February 5, 1997, the Office reduced appellant's compensation, effective March 2, 1997, based on an earning capacity of \$363.94 per week in the selected position.⁵

The Board finds that the Office properly determined appellant's wage-earning capacity.

In the present case, the Office selected the sedentary position of motor vehicle dispatcher (*Dictionary of Occupational Titles* No. 249.167.014). The rehabilitation counselor determined that appellant was both physically and vocationally able to perform the duties of these positions. He also confirmed that these positions were reasonably available in appellant's commuting area by contacting the state employment service and listed the reported weekly wage for the position. The physical requirements of the position include frequent lifting of up to 10 pounds, which includes walk/stand, push/pull of arm/leg controls. With regard to appellant's physical restrictions, appellant's attending physician, Dr. Culp, a Board-certified orthopedic surgeon, completed a work restriction evaluation (OWCP-5) dated May 20, 1996, in which he indicated that appellant could work 8 hours per day, with a lifting restriction of up to 10 pounds and no repetitive work for more than 30 minutes at a time. In an October 9, 1996 opinion, the Office medical adviser noted that the selected position was within the physical restrictions imposed by

⁵ The Office issued a corrected decision on May 7, 1997 in which it corrected the figure listed in item 11 (net compensation for each four weeks).

Dr. Culp. Thereafter, the Office correctly applied the principles set out in *Shadrick*⁶ and reduced appellant's continuing compensation to reflect her employment-related loss of wage-earning capacity.

There is no indication that the selected position is outside the physical restrictions imposed by Dr. Culp. The motor vehicle dispatcher position has a maximum of 10 pounds of lifting, is primarily sedentary, and there is no indication that it required physical activity beyond the stated limitations. Appellant's attorney argues, however, that the medical evidence submitted by Drs. Baldino and Trager pertaining to appellant's complaints of shoulder pain commencing in July 1996 establish that appellant does not have the physical ability to perform the sedentary duties of the selected position. The Board notes, however, that this medical evidence does not address the relevant issue of whether appellant could perform the duties of the sedentary position that was used by the Office to determine her wage-earning capacity.⁷ Moreover, Drs. Baldino and Trager seem to suggest that appellant may have developed a bilateral shoulder condition subsequent to her accepted bilateral wrist condition. The Board has previously stated that physical ailments which preexisted the accepted condition must be taken into consideration when selecting a job for purposes of determining wage-earning capacity; physical ailments acquired subsequently to and unrelated to the accepted injury are; however, excluded from consideration.⁸ As such, appellant's bilateral shoulder condition is not a factor which needed to be taken into consideration of whether appellant could perform the duties of the sedentary position that was used by the Office to determine her wage-earning capacity. The Board finds that the medical evidence establishes the motor vehicle dispatcher position was selected with due regard to appellant's degree of physical impairment.

Appellant's attorney further argues that appellant is not vocationally qualified for the selected position. Appellant's attorney contends that the Office has failed to demonstrate how appellant satisfied the "Specific Vocational Preparation" (hereinafter SVP) requirement of from six months to one year that is listed in the *Dictionary of Occupational Titles* for the position of "[m]otor [v]ehicle [d]ispatcher." He cites the Board's decisions in *Harp*, *Pierce* and *Snyder* in support of his position.⁹

The Board has stated that in order to reduce an employee's compensation based on a position available in the open labor market, one of the elements the Office must establish is that the employee has the specific vocational requisites necessary to perform the described duties of the position.¹⁰ In the cases of *Harp* and *Pierce*, the Board found that the Office did not meet its burden of proof in determining appellant's wage-earning capacity as there was a demonstrated

⁶ *Albert C. Shadrick*, *supra* note 4.

⁷ See generally *Lourdes Davila*, 45 ECAB 139 (1993); *Melvina Jackson* 38 ECAB 443 (1987) (discussing the factors that bear on the probative value of medical opinions).

⁸ *John A. Zibutis*, 33 ECAB 1879 (1982).

⁹ *Ray H. Harp*, 44 ECAB 409 (1993), *Harry E. Pierce*, Docket No. 93-38 (issued October 13, 1993) and *Harold D. Snyder*, 38 ECAB 763 (1987).

¹⁰ See *Harold D. Snyder*, *supra* note 9; 5 U.S.C. § 8115(a).

need for prerequisite training to perform the duties of the selected position. In the case of *Harp*, appellant failed to complete a three-day evaluation program he needed prior to entering a 10-week training program which was necessary to meet the specific vocational requirements. In the case of *Pierce*, appellant failed to complete a remedial instruction program he required prior to the requisite vocational training. The Board further noted that the record failed to show that appellant's prior educational background equipped him with skills which could be deemed transferrable and thus substitute for or qualify him for the selected position without the requisite vocational training. In the case of *Snyder*, the Board found that the Office failed to establish or demonstrate that appellant had the specific vocational requisite necessary to perform the selected position. In that case, the selected position required three to six months of training. The Board found that there was no showing that appellant's prior vocational background or employment history equipped him with skills which could be deemed transferrable and thus substitute for or qualify him for the selected position without the requisite vocational training.

This case, however, is distinguishable from *Harp*, *Pierce* and *Snyder*. Appellant's attorney fails to allege that the record contains any evidence which demonstrates a need for the requisite vocational training, as was the case in both *Harp* and *Pierce*. Additionally, the record is not devoid of a showing of how appellant satisfied the SVP requirement for the selected position, as was the case in *Snyder*. On the contrary, in this case, the rehabilitation counselor had conducted a thorough interview of appellant to ascertain her educational and vocational history, had performed extensive vocational testing and concluded that appellant had "the mental wherewithal to transpose [her] skills to new occupations where minimal training is provided." Moreover, the rehabilitation counselor stated that appellant could perform the sedentary motor vehicle dispatcher position since her "vocational history, the results of our vocational testing [and] our job development efforts illustrate that many employment opportunities do exist for her in the open labor market." Thus, in this case, there is a showing that appellant's prior vocational background or employment history equipped her with skills which could be deemed transferrable and thus substitute for or qualify her for the position of motor vehicle dispatcher without the SVP requirement of from six months to one year. Since rehabilitation counselors are experts in the field of rehabilitation, the Office properly relied on his opinion regarding the vocational suitability of the sedentary "[m]otor [v]ehicle [d]ispatcher" position.¹¹

The record indicates, therefore, that the Office gave due regard to the enumerated factors under 5 U.S.C. § 8115(a) in determining that the position of motor vehicle dispatcher represented appellant's wage-earning capacity. The rehabilitation specialist indicated that the wages for the position was \$334.00 to \$487.00 per week. The Board finds that the Office properly reduced appellant's compensation based on a wage-earning capacity of \$363.94 per week.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b)(2) (December 1993). Appellant's attorney also makes a number of allegations regarding the rehabilitation counselor's conclusions with respect to the reasonable availability and wage rate for the motor vehicle dispatcher position. The Board notes, however, that the attorney fails to allege any identifiable deficiency in the September 10, 1996 rehabilitation counselor's report and appears to base his allegations on his own interpretation of the counselor's billing for the preparation of the report.

The decision of the Office of Workers' Compensation Programs dated February 5, 1997 is hereby affirmed.

Dated, Washington, D.C.
June 9, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member